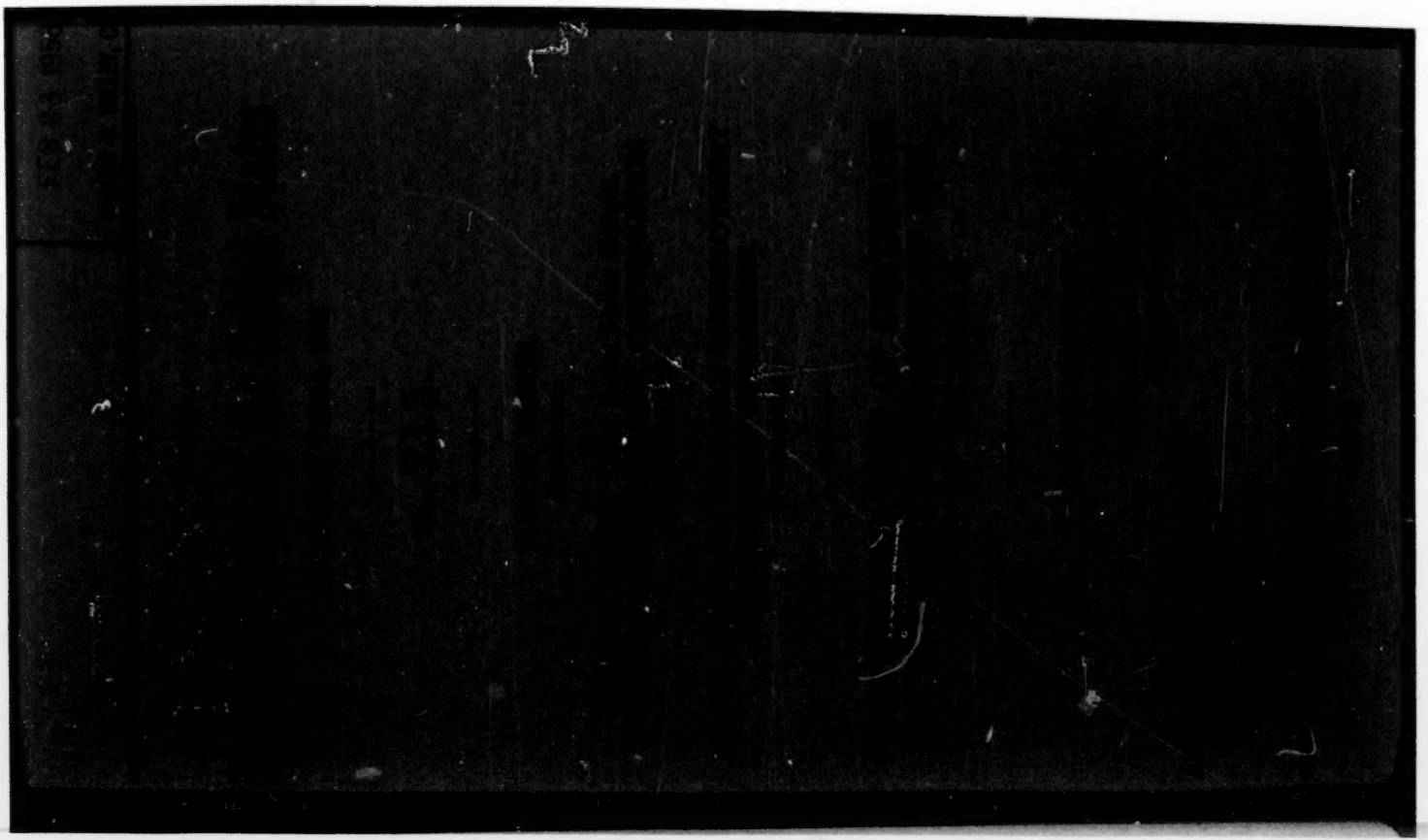

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.....

TOMMY DESKIN,
Petitioner,
vs.
ARTHUR PAZAN, d/b/a Pazan Motor Freight,
MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION
and
APPEAL BOARD OF MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Petitioner prays that a writ of certiorari issue to review the judgment of the Michigan state supreme court entered in the above-entitled cause on December 1, 1955.

OPINIONS BELOW

The memorandum opinion of the Michigan unemployment compensation commission referee and appeal board are unreported and are printed in Appendix B, *infra* pp. 12a-32a. The opinions of the circuit court for Ingham County, Michigan, are unreported and are printed in Appendix B, *infra* pp. 33a-42a. The opinion of the Michigan state supreme court, printed in Appendix B, *infra* pp. 43a-55a, is reported in 343 Mich. 587, 73 N. W. 2d 327.

JURISDICTION

The judgment of the Michigan state supreme court was dated and entered on December 1, 1955. A rehearing was not requested. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3) because the decision below is based upon the construction of a statute of the United States.

QUESTION INVOLVED

Whether the services performed by certain truck owner-operators constitute "employment" within the meaning of section 1607 (c) of the Internal Revenue Code, 26 U. S. C. 1607(c) (1940 ed.), 53 Stat. 187.

STATUTES INVOLVED

The statutory provisions involved are section 1607(c) of the Internal Revenue Code, 26 U. S. C. 1607(c) (1940 ed.), 53 Stat. 187; and Michigan Compiled Laws 1948, section 421.42, Michigan Statutes Annotated, section 17.545. They are printed in Appendix A, *infra* pp. 1a-11a.

STATEMENT

An action to determine the 1949 tax liability of Arthur Pazan, d/b/a Pazan Motor Freight, as an employer under the Michigan unemployment compensation act, was instituted in that year before the state unemployment compensation commission. The appeal board of the commission, reversing a decision by one of its referees, ruled on January 9, 1951, that the truck owner-operators in question were Pazan's employees and that he was therefore subject to the tax. This ruling was initially affirmed by the circuit court for Ingham County, Michigan; but was subsequently reversed on April 20, 1954 following a rehearing of the case. The circuit court held that the owner-operators were independent contractors and not employees of Pazan. Petitioner, as an owner-operator, whose status under the compensation act was necessarily being adjudicated, intervened in the circuit court action on leave granted. The Michigan supreme court, with one justice dissenting, affirmed the circuit court judgment. The Supreme Court judgment is printed in Appendix C, *infra*, p. 43a.

How Federal Question Was Presented

Section 42(6)(n) of the unemployment compensation act incorporated[1] by reference sections 1600-1611 of the federal unemployment tax act, 26 U. S. C. §1600-1611 (1940 ed.). The court below stated that the question to be determined was whether:

> "• • • the service in question (is) included as employment under the federal act in effect in 1939 when section 42(6)(n) of the Michigan act was enacted?"

The court answered this question as follows:

> "We think that question is answered in *United States v. Silk*, 331 U. S. 704, and *Harrison v. Greyvan Lines, Inc.*, 331 U. S. 704."

After quoting at length from this Court's opinion in the *Silk* and *Greyvan* cases, the court below concluded:

> "Application of the quoted language to the facts at bar impels us to the conclusion that the owner operators were independent contractors whose service was not included under the federal act."[2]

This question was raised in the first instance in the state circuit court by the respondent Arthur Pazan in a

---

[1] Although the state act purported to incorporate the provisions of the federal act "as amended", the Michigan supreme court has held that an *in futuro* adoption by reference would be unconstitutional. See: *Colony Town Club v. Comp. Comm.*, 301 Mich. 107, 113-114, 3 N. W. 2d 28; *Bean Co. v. Comp. Comm.*, 308 Mich. 636, 639, 14 N. W. 2d 524; *Lievense v. Comp. Comm.*, 335 Mich. 339, 342, 55 N. W. 2d 857.

[2] Because the court below expressly predicated its decision on federal grounds "it is irrelevant to inquire how and when a federal question was raised", *Manhattan Life Ins. Co. of New York v. Cohen*, 234 U. S. 123, 134. See: *Indiana ex rel. Brand v. Anderson*, 303 U. S. 95, 98; *Wilson v. Cook*, 327 U. S. 474, 480.

motion for rehearing following issuance of an opinion adverse to him. In this motion he contended, among other things, that the opinion of the court ignored the definition of employee as provided by the Acts of Congress and was not in accordance with federal law. On rehearing, the circuit court reversed itself, found for the respondent and the appeal to the Michigan supreme court followed.

REASONS FOR GRANTING THE WRIT

1. Having decided the status of the truck owner-operators under a state unemployment compensation act which incorporated by reference the definitional provisions of the federal unemployment tax act, the court below necessarily decided a federal question.[3] The provision of the Michigan statute is typical of the clauses found in many state unemployment compensation statutes which make the coverage of the state act dependent upon the applicability of the federal unemployment tax act.[4] Thus,

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[3] *Smith v. Kansas City Title Co.*, 255 U. S. 180, 201; *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483. Cf. *State Tax Commission v. Van Cott*, 306 U. S. 511, 513-514; *Wilson v. Cook*, 327 U. S. 474, 486-487; *Flournoy v. Wiener*, 321 U. S. 253, 271-272 (Frankfurter, J., dissenting).

[4] *Code of Alabama 1940* (1954 Pock. Supp.), Tit. 26, Sec. 185 (G) and Sec. 186(D)(14); *Alaska Comp. Laws Ann. 1949*, Sec. 51-5-1(i) (6) (M), p. 1608; *Arizona Code Ann. 1939* (1952 Cum. Supp.), Sec. 56-1002g (e); *Arkansas Stat. Ann. 1947*, Sec. 81.1103 (i)(6)(O), Acts of Arkansas 1955, No. 395; *Gen. Stat. of Conn. 1949*, Sec. 7496; *Delaware Code Ann. 1953*, Tit. 19, Sec. 3302 (8)(G) and Sec. 3302 (10)(E); *Florida Stat. 1953*, Sec. 443.03 (7)(f); *Code of Georgia Ann.* (1955 Pock. Supp.), Sec. 54-657 (g)(7); *Rev. Laws of Hawaii 1945*, Ch. 74, Sec. 4208(Q); *Idaho Code 1947*, Tit. 72, Sec. 1316; *Illinois Rev. Stat. 1953*, Ch. 48, Sec. 370 (A-B); *Code of Iowa 1954*, Sec. 96.19(6) (g); *Burns Ind. Stat. 1951* (1955 Pock. Supp.), Tit. 52, Sec. 1531a (f); *Gen. Stat. of Kansas 1949*

(Continued on next page)

the question here presented is quite likely to be a recurring one. Further, the desirability of a uniform construction of the federal unemployment tax act in its dual role, as a part of the internal revenue code and as a determinant of coverage under many state acts is manifest.

2. The decision of the court below, that it was impelled by the *Silk* and *Greyvan* decisions to conclude as it did, represents an erroneous interpretation of those cases.[5]

(Continued from preceding page)

(1955 Supp.), Sec. 44-703(h)(9); *Kentucky Rev. Stat. 1953*, Sec. 341.070(6); *Louisiana Rev. Stat. 1950*, Tit. 23, Sec. 1472 (11)(d) and Sec. 1472(12)(G); *Rev. Stat. of Maine 1954*, Ch. 29, Sec. 3 IX E; *Ann. Code of Maryland 1951*, Art. 95A, Sec. 19 (4); *Ann. Laws of Massachusetts 1950*, Ch. 151A, Sec. 8(b); *Minnesota Stat. Ann.* (1954 Pock. Supp.), Sec. 268.04, Subd. 10(7); *Missouri Rev. Stat. 1949*, Sec. 288.030 14(7); *Rev. Stat. of Nebraska 1943* (1953 Cum. Supp.), Sec. 48-607 (8); *Laws of Nevada 1955*, Ch. 382, p. 700; *New Hampshire Rev. Stat. Ann. 1955*, Sec. 282:1 (G); *General Stat. of North Carolina 1949* (1955 Cum. Supp.), Sec. 96-8 (g)(7)(N); *North Dakota Rev. Code 1943* (1953 Supp.), Sec. 52-0101 (11)(e); *South Dakota Code of 1939* (1952 Supp.), Sec. 17.0802(6)(e); *Tennessee Code Ann. 1955*, Sec. 50-1308(5) and Sec. 50-1309(7); *Rev. Civil Stat. of Texas 1925* (1955 Pock Supp.), Art. 5221b-17(f)(6), Acts 1955, 54th Leg., ch. 116, sec. 13, p. 399; *Utah Code Ann. 1953*, Sec. 35-4-22 (i)(1) and Sec. 35-4-22 (j)(6); *Vermont Stat. Revision of 1947*, Sec. 5343 V (a); *Code of Virginia 1950*, Sec. 60-12(7); *Rev. Code of Washington*, Sec. 50.04.080; *West Virginia Code 1955*, Sec. 2366 (161); *Wisconsin Stat. 1953*, Sec. 108.02 (4)(b) and Sec. 108.02 (5)(h).

[5] Under Michigan law, where the facts are undisputed, the question of whether an individual is an independent contractor is one of law. *Holbrook v. Olympia Hotel Co.*, 200 Mich. 597, 601, 166 N. W. 876; *Wight v. H. G. Christman Co.*, 244 Mich. 208, 214, 221 N. W. 314; *Utley v. Taylor & Gaskin, Inc.*, 305 Mich. 561, 570, 9 N. W. 2d 842. In the instant case the facts are undisputed. Hence, if this court grants the writ prayed for, only a question of law will be presented. Cf. *Hanley v. Donoghue*, 116 U. S. 1, 6; *Chicago & Alton R'D v. Wiggins Ferry Co.*, 119 U. S. 615, 622-623; *Western Indemnity Co. v. Rupp*, 235 U. S. 261, 275; *Adam v. Saenger*, 303 U. S. 59, 63.

For in the instant case the owner operators performed services under a written lease which provided that Pazan was to have complete control of the leased trucks and assume all legal liabilities arising from their operation. The owner operators were covered by workmen's compensation and were granted seniority rights, over Pazan's admitted employees. Moreover, paid vacations were available to the owner-operators and social security and withholding taxes were deducted from the compensation paid them. These factors were not present in the *Silk* and *Greyvan* cases. Indeed, the owner operators in the instant case were performing services under conditions substantially indistinguishable from those in *Earle v. Babler,* 180 F. 2d 1016 (9th Cir. 1950) where the relationship, for purposes of the federal transportation tax, was found to be that of employer and employee.

CONCLUSION

For the foregoing reasons, the within Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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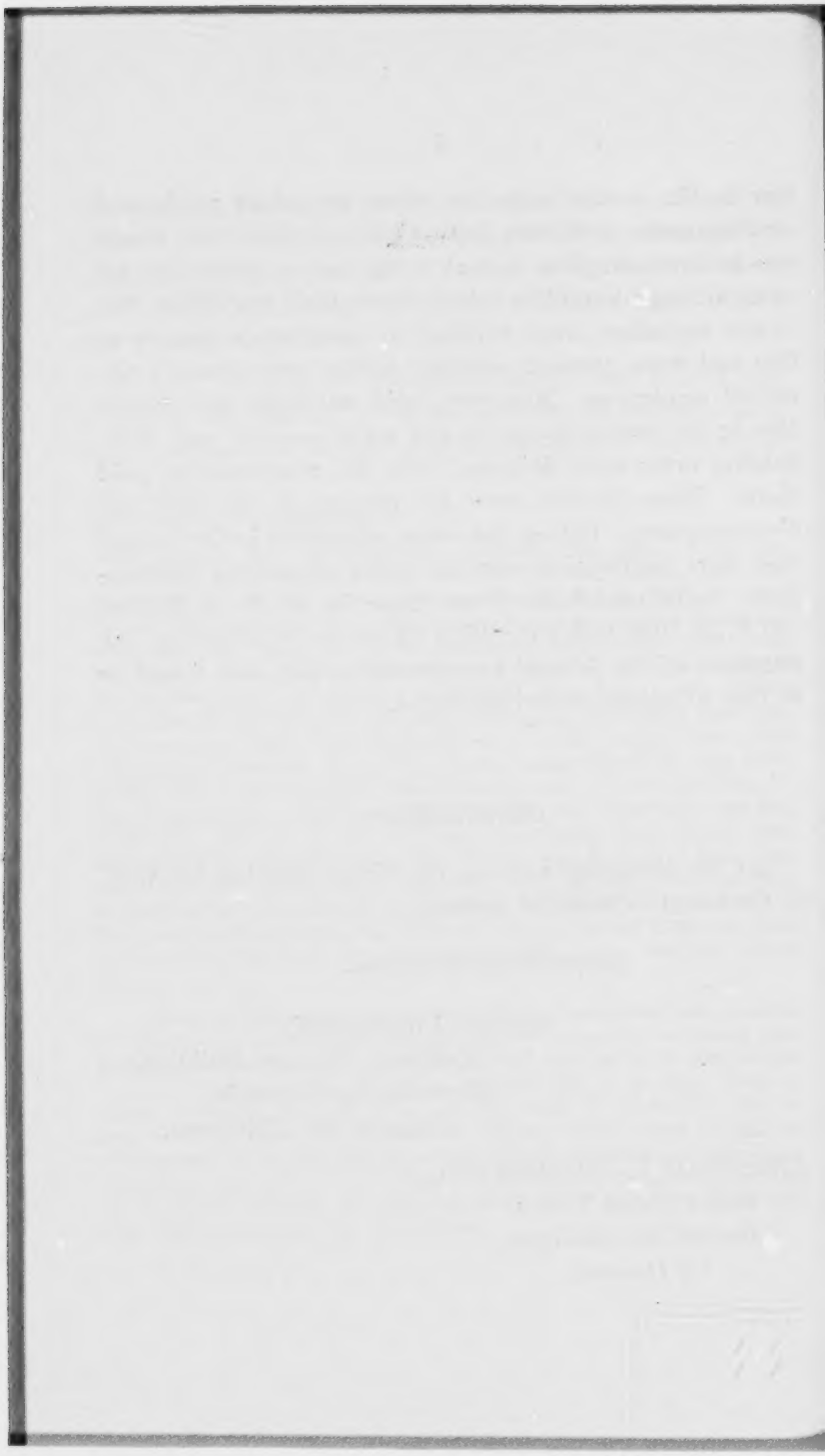

APPENDIX A

Internal Revenue Code, 26 U. S. C. 1607(c) (1940 ed.), 53 Stat. 187

"SEC. 1607. DEFINITIONS.

"When used in this subchapter—

* * * * *

"(c) EMPLOYMENT.—The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

"(1) Agricultural labor (as defined in subsection) (1);

"(2) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority;

"(3) Casual labor not in the course of the employer's trade or business;

"(4) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

"(5) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

"(6) Service performed in the employ of the United States Government or of an instrumentality of the United States which is (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 1600 by virtue of any other provision of law;

"(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 1600;

"(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

"(9) Service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act;

"(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 101, if—

"(i) the remuneration for such services does not exceed $45, or

"(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, or

"(iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university;

"(B) Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101 (1);

"(C) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents, if (i) no part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual, and (ii) 85 per centum or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses;

"(D) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if (i) admission to membership in such association is limited to individuals who are officers or employees of the United States Government, and (ii) no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual;

"(E) Service performed in any calendar quarter in the employ of a school, college, or university, not exempt from income tax under section 101, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university, and the remuneration for such service does not exceed $45 (exclusive of room, board, and tuition);

"(11) Service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

"(12) Service performed in the employ of an instrumentality wholly owned by a foreign government—

"(A) If the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

"(B) If the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemptions is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof:

"(13) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an interne in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to State law;

"(14) Service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission; or

"(15) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

Michigan Compiled Laws 1948, Section 421.42 (Michigan Statutes Annotated, Section 17.545)

*(1) Subject to the other provisions of this section "employment" mean service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied.

(2) The term "employment" shall include an individual's entire service, performed within or both within and without this state if:

(a) The service is localized in this state; or

(b) The service is not localized in any state but some of the service is performed in this state and (1) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (2) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(3) Service performed within this state but not covered under the provisions of subsection (2) of this section and not excluded under the provisions of subsection (7) of this section shall be deemed to be employment subject to this act if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or of the federal government.

(4) Services, not covered under the provisions of subsection (2) of this section, performed entirely without this

*Text above is section 42 in its form in 1949, the year with respect to which the determination of tax liability was made. Subsequent elimination of sub-paragraph 6(m) later resulted in relettering sub-paragraph 6(n) as sub-paragraph 6(m). No change was made in text of sub-paragraph (n).

state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this act (a) if the commission approves the election of the employer for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this act. Such an election may be cancelled by the employer by filing a written notice with the commission before the 30th day of January of any year stating his desire to cancel such election or at any time by submitting to the commission satisfactory proof that the services designated in such election are covered by an unemployment compensation law of another state or of the federal government, or (b) if such services are covered by an arrangement pursuant to section 11 of this act between the commission and the agency charged with the administration of any other state or federal unemployment compensation law, pursuant to which all services performed by an individual for an employing unit are deemed to be performed entirely within the state, shall be deemed to be employment if the commission has approved an election of the employing unit for which such services are performed, pursuant to which the entire service of such individual during the period covered by such election is deemed to be employment.

(5) Service shall be deemed to be localized within a state if:

(a) The service is performed entirely within such state; or

(b) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

(6) Except as otherwise provided in subsection (7) of this section the term "employment" shall not include:

(a) Service performed in the employ of this state, or any political subdivision thereof;

(b) Service performed in the employ of any other state or its political subdivisions, or of an instrumentality of any other state or states or their political subdivisions; and service performed in the employ of the United States government or an instrumentality of the United States exempt under the constitution of the United States from the contributions imposed by this act, except that to the extent that the congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all the provisions of this act shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services: *Provided,* That if this state shall not be certified for any year by the social security board under section 1603 (c) of the federal internal revenue code, the payments required of such instrumentalities with respect to such year shall be refunded by the commission from the fund in the same manner and within the same period as is provided in section 16 of this act with respect to contributions erroneously collected;

(c) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress: *Provided,* That the commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of congress, which agreemenets shall become effective 10

days after publication thereof in the manner provided in section 4 of this act for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this act, acquired rights to unemployment compensation under such act of congress, or who have, after acquiring potential rights to unemployment compensation under such act of congress, acquired rights to benefits under this act;

(d) The term "agricultural labor" includes all service performed:

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) In connection with the production or harvesting of maple syrup or maple sugar or any commodity defined as an agricultural commodity in section 15 (g) of the federal agricultural marketing act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes;

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" including stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(e) Domestic service in a private home;

(f) Service as an officer or member of a crew of an American vessel performed on or in connection with such vessel, if the operating office, from which the operations of the vessel operating on navigable waters within or without the United States are ordinarily and regularly supervised, managed, directed and controlled, is without this state; and service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking or harvesting of any kind of fish (including service performed by any individual as an ordinary incident to any such activity), except service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States).

(g) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

(h) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, and homes operated for welfare and old age assistance patients, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(i) Service performed in a purely professional capacity, not in the nature of permanent employment;

(j) Service perfomed as a part-time worker by a minor whose principal occupation during the school year is as a student actually attending a public or private school;

(k) Service performed by real estate salesmen and agents of insurance companies who are compensated principally or wholly on a commission basis;

(l) Service performed within this state which is incidental to the individual's service in a foreign country in which the base of operations is maintained or from which such service is directed or controlled;

(m) Service performed in logging or woods operations, compensated wholly on a piecework or quantity basis, unless such services are included as "employment" under the federal unemployment tax act;

(n) *Any service not included as "employment" under the federal unemployment tax act (secs. 1600-1611 of the internal revenue code), as amended.** If an employer has obtained a decision in writing from an authorized agent of

*Italics supplied.

the United States bureau of internal revenue holding that specified services are not included as "employment" under section 1607 of the internal revnue code, such decision shall, in the absence of a claim for benefits filed by an employee whose right to benefits may be affected, by such decision, be conclusive upon the commission for the purpose of determining the liability of such employer for contributions under this act unless the commission, after notice and hearing, makes a determination to the contrary based upon substantial evidence. Such decision by an authorized agent of the United States bureau of internal revenue shall be conclusive for the purpose of determining the rights of such claimant to benefits under this act unless the commission, a referee or the appeal board after notice and hearing shall, based upon substantial evidence, determine that such services constitute "employment" under this act.

(o) Service covered by an arrangement between the commission and the agency charged with the administration of any other state or federal unemployment compensation law pursuant to which all services performed by an individual for an employing unit during the period covered by such employing unit's duly approved election, are deemed to be performed entirely within such agency's state or under such federal law.

(7) Notwithstanding the provisions of subsection (6) of this section, any services performed for an employing unit, with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund, shall be deemed to constitute employment for the purposes of this act, but only to the extent that such services constitute employment with respect to which such federal tax is payable.

APPENDIX B—OPINIONS BELOW

Opinion of Referee, Michigan Unemployment Compensation Commission

FINDINGS OF FACTS AND REASONS

On November 29, 1949, a *determination was issued holding that certain truck owners who operated for the appellant, Arthur Pazan, d/b/a Pazan Motor Freight, rendered services in employment and that the appellant was subject to the Act for the year 1949, under Section 41 (1).* Arthur Pazan appealed this determination to a Referee on December 7, and the hearing was held on January 17, 1950.

Arthur Pazan and another individual operated a motor freight business in Lansing for a period of time to sometime in 1948, when the partnership was dissolved. Sometime in 1948, Arthur Pazan commenced operating the Pazan Motor Freight Company in the City of Detroit. He contacted some individuals, owners of trucks, to haul freight in the operation of his business who became lessors under a lease agreement, a copy of which is as follows:

"LEASE AGREEMENT

Lease between Pazan Motor Freight with offices and principal place of business at 14201 Joy Road, Detroit, Michigan,

PARTY OF THE FIRST PART and .....

PARTY OF THE SECOND PART.

WITNESSETH AS FOLLOWS:

1. First party, hereby engages and leases from the Second Party for use in its service as..... the within described equipment, Number ..... Make ..... Type ..... Serial No. ..... Year .... Capacity ..... Weight ..... Lis. No..... to be used by First Party in transporting freight and merchandise.

2. First Party agrees to pay Second Party..... for the use of said equipment.

3. In case the Second Party's services shall be engaged as driver of the said equipment, compensation therefor shall be paid by the First Party at a minimum rate of ..... such rate when once established shall not be changed without five days' written notice. In such cases the Party of the Second Part shall be deemed an employee of said First Party and shall be entitled to all rights and privileges as an employee. First Party hereby expressly assumes all duties and liabilities of an employer.

4. This agreement may be cancelled by either party at any time upon fifteen days' written notice. Such written notice of cancellation shall be deemed given when delivered personally or by registered mail to either party at their

address apearing below. Whenever said notice of cancellation is served on either party, he shall make final settlement and payment of any sum or sums due. Said payment must be made on or before the fifteen-day limitation herein referred to.

5. It is specifically agreed and understood between the parties hereto that Second Party, in leasing and furnishing the equipment described in this contract for operation by the First Party, shall not in any way control the use or operation of such equipment, and that the First Party shall have complete control of such equipment. It is further understood and agreed that the First Party expressly assumes all legal liabilities which may arise as though in fact said equipment was owned by said First Party.

6. This lease agreement is deemed to have been executed in the State of Michigan as a legal contract, and construed in all things in accordance with the laws and decisions of that State.

IN WITNESS WHEREOF, First Party has caused this lease agreement to be executed by its authorized agent, and Second Party has annexed his name this...day of....

Witnesses:

Pazan Motor Freight

..... By .....
Party of the First Part
14201 Joy Road, Detroit, Michigan

....
Party of the Second Part

....
Address"

On or about the time Arthur Pazan commenced operating his motor freight business he advised the Commission of the nature of the business he was operating, submitted a copy of the lease, and asked for a ruling to determine whether or not these individuals rendered services in employment under the Act. A determination was issued by the Commission as of January 20, 1949, holding that the individuals who operated as lessors of the trucks did not render services in employment, and that he was not subject to the Act. Mr. Pazan took this ruling into consideration when setting his charges for freight to be hauled believing that he owed no contributions to the Michigan Unemployment Compensation Commission.

As a result of a claim subsequently filed sometime during the year 1949, by a former employee of Arthur Pazan, another audit of the books and records of the appellant was made. Following this audit, the Commission issued another determination as of October 4, 1949, holding that these individuals who operated trucks as lessors rendered services, in employment, and that they should be included in the employee count, and that the appellant was liable for the year 1949. After the request for redetermination was issued, the determination of November 29, 1949, followed.

In addition to the lessors who operated for the appellant, he had some truck drivers who drove trucks owned by him whom he considered to be employees. Counting the lessors and the employees who drove the trucks owned by the appellant, the appellant had 8 or more individuals in employment for 20 or more different calendar weeks during the year 1949. Deleting the lessors from the employee count, the appellant would not have any weeks in which there were 8 or more individuals in employment.

No definite rule was used in regard to the manner in which the lessors were paid for services rendered. If the lessor had a good week's business he would usually be paid in two checks. One check would be about 20% of the total amount which would be construed as wages from which social security would be deducted. If the amount owing for a week's work was comparatively small, the lessor would usually be paid in one check with no deductions for social security. Sometimes if the lessor had a good week's work, and requested that one check be issued to him for the full amount, the appellant would comply with his request with no social security deducted. Sometimes a lessor would request that a check be issued to him to cover insurance or repairs for the truck which would be issued as per request with no deductions. As a rule, withholding tax would be withheld on the 20% paid because of the possibility of being subject to a lawsuit from the government if this was not done.

The appellant's wife acted as bookkeeper for the company and conducted the office part of the business pretty much the same way they did when previously operating in Lansing under a partnership with another individual. Believing that the lessors should not be considered as rendering services in employment, the appellant filed a petition the fore part of December 1949, with the Federal Government for a refund of social security deductions paid.

According to the Union agreement between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L. and the Private, Common and Contract Carriers of 12 midwestern states, the lessor shall be deemed to have seniority with the Carrier as a driver only. This agreement was effective for the period from November 16, 1948, to November 15, 1949.

After the lessor entered in an agreement with the appellant, the appellant had no choice as to who would drive the truck owned by the lessor. The lessor at times would drive the truck himself and sometimes had another individual to drive it for him without consulting the appellant. As a rule, the lessors wanted to select their own drivers and did so.

The appellant obtained permits from the Public Service Commission for the lessors who operated in his business and which could be used only for hauling appellant's freight. The lessors made a practice of hauling for other motor freight carriers and sometimes when the appellant would call on them to haul freight for him they were not available because of being engaged elsewhere. Sometimes the lessor would refuse to carry a load of freight, if he thought the job did not pay enough. The appellant had signs to attach to the trucks showing for whom the lessors were hauling, but some of the lessors refused to carry these signs because it might be a hinderance to them in getting business with other motor freight carriers. The only instructions the appellant gave to the lessors when hauling freight was where to pick up the load and where to deliver it. The route that the lessor may take was of his own choosing. The lessor was liable for all expenses such as gas, oil and repairs of the truck.

The primary issue to be considered in this appeal is whether or not the truck-owners who operated as lessors rendered services in employment within the meaning of the Act.

According to Section 42 (1) of the Act "employment" means service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied.

In determining whether or not the lessors rendered services in employment, we are governed by the common law concepts of the relation of master and servant. This fact was stressed by the Supreme Court throughout its opinion in the case of Bonifas-Gorman Lumber Company v. Michigan Unemployment Compensation Commission, 313 Mich. 363. That opinion interpreted a contract between a lumber company and workers on the timber tract. About the only type of equipment that a worker in the woods, commonly known as a lumberjack, would furnish would be that of an axe saw. That contract definitely set out the relations between the lumberjack and the lumber company and did not state whether he would be deemed to be an independent contractor or an employee.

In the instant case, very little is said in the lease agreement of the relations between the lessor and the appellant except that he shall be deemed to be an employee and entitled to all rights and privileges of an employee. Another part of the lease agreement states that the appellant shall have complete control of the equipment but this does not grant him control over the individual owner.

It seems that the word "employee" was inserted in this agreement as a rider with the expectation that it covered the employer-employee relation without definitely setting out such relation. Since the lease agreement does not definitely set out the relations between the parties, we are governed primarily by what occurred though actual operations. About the only manner of control the appellant exercises over the lessors was to tell them where to pick up the load and where to deliver it. They had the privilege of refusing to take a load if they wanted to, which they did at times. The lessors would select their own drivers; they could work for other companies; they could refuse to take a load if they saw fit to do so; and, they were per-

mitted to take whatever route they saw fit to haul a load. These facts indicate that the appellant did not have direction or control over the lessors within the meaning of the common law concepts of the relation of master and servant, but instead they were liable to him for results only. The appellant was therefore not subject to the Act for the year 1949.

DECISION

The determination issued November 29, 1949, is hereby reversed and set aside.

It is held that the appellant was not a liable employer under the Act for the year 1949. It is further held that the truck-owners who operated as lessors did not render services in employment.

Dated at Detroit, Michigan, and mailed on February 1, 1950.

/s/ Albert W. Haines, Referee.

Opinion of Appeal Board

DECISION OF APPEAL BOARD

This matter is before the Appeal Board upon an appeal filed February 14, 1950, by the Michigan Unemployment Compensation Commission, from a Referee's decision dated February 1, 1950, which held as follows:

> "The determination issued November 29, 1949, is hereby reversed and set aside.
>
> It is held that the appellant was not a liable employer under the Act for the year 1949. It is further held that the truck owners who operated as lessors did not render services in employment."

We have reviewed the record and the testimony and considered the evidence disclosed thereby in connection with the Referee's decision.

It is our opinion that the following facts set forth by the Referee's decision are supported by the record and we quote:

> "• • • Arthur Pazan and another individual operated a motor freight business in Lansing for a period of time to sometime in 1948, when the partnership was dissolved. Sometime in 1948, Arthur Pazan commenced operating the Pazan Motor Freight Company in the City of Detroit. He contacted some individuals, owners of trucks, to haul freight in the operation of his business who became lessors under a lease agreement, a copy of which is as follows:

'LEASE AGREEMENT

Lease between Pazan Motor Freight with offices and principal place of business at 14201 Joy Road, Detroit, Michigan,

PARTY OF THE FIRST PART and.....

PARTY OF THE SECOND PART.

Witnesseth as follows:

1. First party, hereby engages and leases from the Second Party for use in its service as..... the within described equipment,

Number....Make....Type....Serial No.....Year.....Capacity.....Weight.....Lis. No..... to be used by First Party in transporting freight and merchandise.

2. First Party agrees to pay Second Party..... for the use of said equipment.

3. In case the Second Party's services shall be engaged as driver of the said equipment, compensation therefor shall be paid by the First Party at a Minimum rate of..... Such rate when once established shall not be changed without five days' written notice. In such cases the Party of the Second Part shall be deemed an employee of said First Party and shall be entitled to all rights and privileges as an employee. First Party hereby expressly assumes all duties and liabilities of an employer.

4. This agreement may be cancelled by either party at any time upon fifteen days' written notice. Such written notice of cancellation shall be deemed given

when delivered personally or by registered mail to either party at their address appearing below. Whenever said notice of cancellation is served on either party, he shall make final settlement and payment of any sum or sums due. Said payment must be made on or before the fifteen day limitation herein referred to.

5. It is specifically agreed and understood between the parties hereto that Second Party, in leasing and furnishing the equipment described in this contract for operation by the First Party, shall not in any way control the use or operation of such equipment, and that the First Party shall have complete control of such equipment. It is further understood and agreed that the First Party expressly assumes all legal liabilities which may arise as though in fact said equipment was owned by said First Party.

6. This lease agreement is deemed to have been executed in the State of Michigan as a legal contract, and construed in all things in accordance with the laws and decisions of that State.

IN WITNESS WHEREOF, First Party has caused this lease agreement to be executed by its authorized agent and Second Party has annexed his name this.... day of.....

Witness:

Pazan Motor Freight

.....

By.....
Party of the First Part
14201 Joy Road, Detroit, Michigan

.....

.....
Party of the Second Part

.....

.....
Address'

"On or about the time Arthur Pazan commenced operating his motor freight business he advised the Commission of the nature of the business he was operating, submitted a copy of the lease, and asked for a ruling to determine whether or not these individuals rendered services in employment under the Act. A determination was issued by the Commission as of January 20, 1949, holding that the individuals who operated as lessors of the trucks did not render services in employment, and that he was not subject to the Act. Mr. Pazan took this ruling into consideration when setting his charges for freight to be hauled believing that he owed no contributions to the Michigan Unemployment Compensation Commission.

"As a result of a claim subsequently filed sometime during the year 1949, by a former employee of Arthur Pazan, another audit of the books and records of the appellant was made. Following this audit, the Commission issued another determination as of October 4, 1949, holding that these individuals who operated trucks as lessors rendered services, in employment, and that they should be included in the employee count, and that the appellant was liable for the year 1949. After the request for redetermination was issued, the determination of November 29, 1949, followed.

"In addition to the lessors who operated for the appellant, he had some truck drivers who drove trucks owned by him whom he considered to be employees. Counting the lessors and the employees who drove the trucks owned by the appellant, the appellant had 8 or more individuals in employment for 20 or more different calendar weeks during the year 1949. Deleting the lessors from the employee count, the appellant would not have any weeks in which there were 8 or more individuals in employment.

"No definite rule was used in regard to the manner in which the lessors were paid for services rendered. If the lessor had a good week's business he would usually be paid in two checks. One check would be about 20% of the total amount which would be construed as wages from which social security would be deducted. If the amount owing for a week's work was comparatively small, the lessor would usually be paid in one check with no deductions for social security. Sometimes if the lessor had a good week's work, and requested that one check be issued to him for the full amount, the appellant would comply with his request with no social security deducted. Sometimes a lessor would request that a check be issued to him to cover insurance or repairs for the truck which would be issued as per request with no deductions. As a rule, withholding tax would be withheld on the 20% paid because of the possibility of being subject to a lawsuit from the government if this was not done.

"The appellant's wife acted as bookkeeper for the company and conducted the office part of the business pretty much the same way they did when previously operating in Lansing under a partnership with another individual. Believing that the lessors should not be considered as rendering services in employment, the appellant filed a petition the fore part of December, 1949, with the Federal Government for a refund of social security deductions paid.

"According to the Union agreement between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L. and the Private, Common and Contract Carriers of 12 midwestern states, the lessor shall be deemed to have seniority with the Carrier as a driver only. This agree-

ment was effective for the period from November 16, 1948, to November 15, 1949.

* * * * *

"The appellant obtained permits from the Public Service Commission for the lessors who operated in his business and which could be used only for hauling appellant's freight. * * * The lessor was liable for all expenses such as gas, oil and repairs of the truck. * * *"

Under date of March 9, 1950, the Appeal Board received a communication from A. L. Zwerdling of the firm of attorneys of Zwerdling and Zwerdling, requesting permission to appear on behalf of the claimant at the time this matter was set for hearing by the Appeal Board. Mr. Zwerdling appeared at the hearing subsequently held before the Appeal Board and argued orally a motion to be allowed to intervene in said matter. The Appeal Board sustained this motion. He thereafter presented arguments in support of the Referee's decision and Mr. Long of the Michigan Unemployment Compensation Commission also urged that the Referee's decision be affirmed.

The issue is whether or not the services performed by the truck-owner operators under the so-called leasing agreement constituted "employment" within the meaning of Section 42 of the Michigan Unemployment Compensation Act.

The solution to said issue is dependent upon the application of the provisions contained in the above mentioned section of the Act to the facts established by the evidence in this case.

An analysis of the legal issue involved and the statement of the conclusions and reasoning employed in relation thereto as conceived by the Referee in arriving at a decision in

this matter is set forth on Page 4 of the decision. We quote said portion of the decision:

> "* * * In determining whether or not the lessors rendered services in employment, we are governed by the common law concepts of the relation of master and servant. This fact was stressed by the Supreme Court throughout its opinion in the case of Bonifas-Gorman Lumber Company vs. Michigan Unemployment Compensation Commission, 313 Mich. 363. That opinion interpreted a contract between a lumber company and workers on the timber tract. About the only type of equipment that a worker in the woods, commonly known as a lumberjack, would furnish would be that of an axe saw. That contract definitely set out the relations between the lumberjack and the lumber company and did not state whether he would be deemed to be an independent contractor or an employee.
>
> "In the instant case, very little is said in the lease agreement of the relations between the lessor and the appellant except that he shall be deemed to be an employee and entitled to all rights and privileges of an employee. Another part of the lease agreement states that the appellant shall have complete control of the equipment but this does not grant him control over the individual owner.
>
> "It seems that the word 'employee' was inserted in this agreement as a rider with the expectation that it covered the employer-employee relation without definitely setting out such relation. Since the lease agreement does not definitely set out the relations between the parties, we are governed primarily by what occurred through actual operations. About the only manner of control the appellant exercises over the lessors

was to tell them where to pick up the load and where to deliver it. They had the privilege of refusing to take a load if they wanted to, which they did at times. The lessors would select their own drivers; they could work for other companies; they could refuse to take a load if they saw fit to do so; and, they were permitted to take whatever route they saw fit to haul a load. These facts indicate that the appellant did not have direction or control over the lessors within the meaning of the common law concepts of the relation of master and servant, but instead they were liable to him for results only. * * *"

Our review of the record discloses phases of the relationship between Pazan Motor Freight and the truck-owner operators in question which tend to sustain the contention of the Pazan Motor Freight company that these individuals are independent contractors but, on the other hand, much in the record supports the contention of the Michigan Unemployment Compensation Commission and of counsel representing the claimant's interests, that the individuals in question under the provisions of the controlling statute, are employees of Pazan Motor Freight. The decision on this controlling question must be made from an overall consideration of the evidence contained in the record viewed in the light of the leasing agreement heretofore set forth. The evidence contained in the record to the effect that the major portion of the expenses incidental to the upkeep and operation of the leased equipment was borne by the truck-owners while indicative of an independent contractual relationship, is not conclusive thereof. So also do we consider the effect of the provisions contained in the leasing contract to the effect that in the event the lessor of the equipment was engaged as driver thereof, he shall be deemed to be an employee of Arthur Pazan, d/b/a Pazan Motor Freight and

also the further provision whereby the latter assumes all duties and liabilities of an employer. We are in full accord with the Referee's view concerning the effect of these provisions and concur in his conclusion to the extent that the use of the word "employee' as inserted in any agreement with the expectation that it covered the employer-employee relationship *without definitely setting out such relationship* does not of and by itself establish such relationship.

Our concept of the over-all effect of the written contract however, leads us to a conclusion which is contrary to that expressed by the Referee in support of the decision rendered herein. The language of the phrases contained in paragraph 5 of said leasing agreement which provides that in leasing and furnishing the equipment described in the contract for operation by the first party (lessor), the lessor shall not in any way control the use of operation of such equipment and that the lessee shall have complete control of such equipment, is significant with reference to the matter of control over the truck-owners when engaged as operators of said leased equipment. Under these circumstances the right of Pazan Motor Freight to control such equipment logically involves the right to issue directions or orders in connection with the use or operation of said equipment. It would seem that, in making such an agreement, the parties contemplated that the job to be performed was after all the undertaking of Arthur Pazan, d/b/a Pazan Motor Freight with the party for whom the job was to be performed and that the responsibility for performance thereof rested with Arthur Pazan, d/b/a Pazan Motor Freight. The contract did not undertake to limit the control granted to the lessee, Arthur Pazan, d/b/a Pazan Motor Freight over the operation or use of the equipment either as to character, detail, or time. In this respect the only restrictions would be with regard to the time the leasing contract itself was in existence and in effect and this does not here present a problem

since all of the interested parties in their arguments contemplated a valid existing contract during the period involved. In this connection we should also point out that it is immaterial under a written contract whether or not the contract was carried out strictly according to its terms.

Under the terms of the written agreement, the employing unit herein was granted complete control over the use and operation of the equipment in question and that is sufficient to establish the fact that the questioned services herein were performed under an employer-employee relationship.

Relative to the argument advanced in connection with the Union contract, it should be noted that, in arriving at a decision in the instant matter, this Board does not consider itself in any way bound by the conditions set forth therein, but it considers said contract merely as one of the factors to be considered along with all other matters of evidence contained in the record.

Other factors herein which lend support to the correctness of our conclusion is that the Pazan Motor Freight paid Social Security taxes at least in some instances on the remuneration paid for the questioned services and they also took out Withholding taxes therefrom. Further than this it is noteworthy to observe that the application for determination of employment status in connection with the owners and operators of tractors, attached to Exhibit No. 1 and filed by Pazan Motor Freight, contains information which supports our conclusion in this matter. A certification to the truth of the answers given to questions therein contained is purportedly signed by Arthur Pazan as owner of Pazan Motor Freight. The following questions and answers are the ones to which reference is made:

"***3. Does the employee maintain his own place of business?

No.

4. Is he advertised or listed in phone or directories as being in such business and available to the public generally? Explain fully.

No.

5. What is the nature of the employee's business?

Drives own equipment in the transportation of freight for the Pazan Motor Freight.

* * *

7. Does the employee perform similar services for others during the business day?

No.

8. Do you have any right to direct and control the performance of the services rendered?

Yes.

In what manner?

They deliver the freight where it is consigned to.

9. Is there an agreement for the performance of such services?

Enclosed.

(If so, kindly submit a copy of same.)

Written?

Yes.

* * *

12. Does the employee hire his own assistants?

No.

• • •

15. Can you discharge: (a) the employee?

Yes.

• • •

17. Can the services be terminated at any time by either party?

Yes.

Explain manner of:

At 15 day notice on part of Employer and/or broker.

18. Must the employee conform to prescribed hours of employment?

Yes.

• • •

21. Does the name of the employee and/or his assistants appear on your pay roll?

At present.

22. How are such disbursements shown or carried on your records?

As salary.

• • •

26. Have you elected to become subject to the Michigan Workmen's Compensation Law (Act 10 of 1912, as amended) with respect to the type of worker in question here?

Yes.

If so, indicate method adopted to provide for payment of compensation

( ) Self-burden
(X) Insurance * * *"

In view of the above matters, it is the finding of this Board that the services in question were performed for Pazan Motor Freight under an employer-employee relationship.

The decision of the Referee is hereby reversed.

It is held that the services performed in the operation of the leased equipment in question by the owners thereof, constituted "employment" within the meaning of Section 42 of the Michigan Unemployment Compensation Act.

It is further held that Arthur Pazan, d/b/a Pazan Motor Freight was an "employer" effective January 1, 1949, under the terms of Section 41 (1) of the Michigan Unemployment Compensation Act.

/s/ Calvin N. Smith
Calvin N. Smith, Chairman
/s/ Chas. E. Lougheed
Charles E. Lougheed, Member
/s/ Duane H. Mosier
Duane H. Mosier, Member

Dated: Jan. 9, 1951.

First Opinion of the Circuit Court

This is an appeal from the Appeal Board of the Michigan Unemployment Compensation Commission, now known as Michigan Unemployment Security Commission. The Appeal Board held that services performed in the operation of leased equipment by owner-drivers during the year 1949 constituted employment within the meaning of Section 42(1) of the Unemployment Compensation Act and that Arthur Pazan d/b/a Pazan Motor Freight, was an employer effective January 1, 1949 under the terms of Section 41 of the Act. The issue in this cause is whether the owner-drivers are employees of plaintiff or whether they are independent contractors. In 1948 the plaintiff began operations as the Pazan Motor Freight, and he contacted certain individuals who owned motor trucks to haul freight in the operation of his business. They entered into a lease agreement with him as follows:

"LEASE AGREEMENT

Lease between Pazan Motor Freight with offices and principal place of business at 14201 Joy Road, Detroit, Michigan,

Party of the First Part and.....

Party of the Second Part.

Witnesseth as follows:

1. First party, hereby engages and leases from the Second Party for use in its service as..... the within described equipment,

Number....Make....Type....Serial No.....Year... .....Capacity.....Weight.....Lis. No..... to be used by First Party in transporting freight and merchandise.

2. First Party agrees to pay Second Party..... for the use of said equipment.

3. In case the Second Party's services shall be engaged as driver of the said equipment, compensation therefor shall be paid by the First Party at a Minimum rate of ..... Such rate when once established shall not be changed without five days' written notice. In such cases the Party of the Second Part shall be deemed an employee of said First Party and shall be entitled to all rights and privileges as an employee. First Party hereby expressly assumes all duties and liabilities of an employer.

4. This agreement may be cancelled by either party at any time upon fifteen days' written notice. Such notice of cancellation shall be deemed given when delivered personally or by registered mail to either party at their address appearing below. Whenever said notice of cancellation is served on either party, he shall make final settlement and payment of any sum or sums due. Said payment must be made on or before the fifteen day limitation herein referred to.

5. It is specifically agreed and understood between the parties hereto that Second Party, in leasing and furnishing the equipment described in this contract for operation by the First Party, shall not in any way control the use or operation of such equipment, and that the First Party *shall have complete control of such equipment.* It is further understood and agreed that the First Party expressly assumes all legal liabilities which may arise as though in fact said equipment was owned by said First Party.

6. This lease agreement is deemed to have been executed in the State of Michigan as a legal contract,

and construed in all things in accordance with the laws and decisions of that State.

IN WITNESS WHEREOF, First Party has caused this lease agreement to be executed by its authorized agent and Second Party has annexed his name this ....day of.....

Witness: Pazan Motor Freight

..... By .....
Party of the First Part
14201 Joy Road, Detroit, Michigan"

Under the terms of the above agreement the plaintiff would contact the truck owners and he would inform them when they were to go to a certain shipper and pick up a load of freight and if they were not previously informed in most cases they were informed at the time they picked up the freight where the delivery should be made. The owner-operators, while working for the plaintiff, were operating under a certificate issued to the plaintiff by the Michigan Public Service Commission.

There is some testimony in the record that the above contract was varied or at least not always followed by the parties, but the record also indicates that the said contract was never rescinded by the plaintiff or the owner-operators and that it was in effect during the year of 1949.

It should be noted from the above contract that in Paragraph 2 the plaintiff agreed to lease the trucks from the owners and pay a certain amount as rental of the trucks. In Paragraph 3 it states that in the event that the owner is engaged as the operator of the truck that he is to receive

a certain amount for his services and that he was to be deemed an employee of the plaintiff and entitled to all the rights and privileges of an employee. Paragraph 4 of the agreement provided that either party could cancel the agreement with fifteen days' written notice.

In Paragraph 5 it specifically states that the party of the first part, being the plaintiff in this cause, should have complete control over such equipment which he leased and that the owner-operator would not in any way control the use or operation of such equipment.

Section 42 (1) being Section 17.545 of M. S. A. defines employment as follows:

> "Subject to the other provisions of this section 'employment' means service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied."

The record discloses that the owner-operators usually were paid by plaintiff by way of checks, one for an amount which was deemed to be for services or wages and on which amount the plaintiff collected Social Security Taxes and Withholding Taxes and by another check which was deemed to be for rental of the equipment. The record further discloses that the plaintiff did exercise control over the owner-operators of the trucks. He had control over which owner-operator was to work for him and had control of the time when such work should be performed. He had control in directing the owner-operator to go to a certain place and pick up the load of freight and had control of seeing that the freight was delivered to the proper place even though he himself did not say where the delivery was to be made, that information being given to the

owner-operator at the point where he picked up the load of freight. It may be that the plaintiff did not exercise all of the control he could have over the owner-operators, but under the contract between him and the owner-operators he had absolute control if he cared to exercise the same.

In the case of Nordman v. Calhoun, 332 Mich. 460 on page 466, the Court stated as follows:

> "In our opinion the statutory definition of 'employment' as provided in section 42(1) of the act is clear and unambiguous. It means service performed for remuneration or under an oral or written contract for hire. The only issue in the case at bar is to determine whether Date Scofield was an employee or an independent contractor. In the case at bar Date Scofield was hired for an indefinite period and could have severed his employment at any time. Moreover, his employer could have discharged him at any time, with or without cause. The fact that the employer did not find it necessary to exercise any detailed supervision over the performance of the employee's duties is not determinative of the employer-employee relationship, nor does the fact that Date Scofield was a part-time employee bring him within the exception found in the act. In view of the fact that the services performed by Date Scofield are undisputed, we hold as a matter of law that he was an employee."

In the instant case the owner-operators were hired for an indefinite period and could have severed their employment at any time upon giving of fifteen days' written notice, or at any time they cared to do so. The plaintiff could have so discharged the owner-operator at any time with or without cause by giving the same fifteen day no-

tice. In the instant case as well as in the case above cited, the plaintiff may not have exercised all the control that he cared to over the employee, but still he had the right of absolute control if he cared to use it.

Another important factor found by the Commission in support of their contention that the owner-operators were employees rather than independent contractors is the application for determination of employment status attached to Exhibit 1 of the record and which was filled out by the plaintiff, which is as follows:

"****3. Does the employee maintain his own place of business?

No.

4. Is he advertised or listed in phone or directories as being in such business and available to the public generally? Explain fully.

No.

5. What is the nature of the employee's business?

Drives own equipment in the transportation of freight for the Pazan Motor Freight.

* * *

7. Does the employee perform similar services for others during the business day?

No.

8. Do you have any right to direct and control the performance of the services rendered?

Yes.

In what manner?

They deliver the freight where it is consigned to.

9. Is there an agreement for the performance of such services?

Enclosed.

(If so, kindly submit a copy of same.)

Written?

Yes.

• • •

12. Does the employee hire his own assistants?

No.

• • •

15. Can you discharge: (a) the employee?

Yes.

• • •

17. Can the services be terminated at any time by either party?

Yes.

Explain manner of:

At 15 day notice on part of Employed and/or broker.

18. Must the employee conform to prescribed hours of employment?

Yes.

• • •

21. Does the name of the employee and/or his assitants appear on your payroll?

At present.

22. How are such disbursements shown or carried on you records?

As salary.

* * *

26. Have you elected to become subject to the Michigan Workmen's Compensation Law (Act 10 of 1912, as amended) with respect to the type of worker in question here?

Yes.

If so, indicate method adopted to provide for payment of compensation.

( ) Self-burden
(X) Insurance * * *"

If any doubt remains about the question as to whether or not the owner-operators are employees or independent contractors this Court is of the opinion that that doubt is removed by the statement of the Supreme Court in the case of Nordman v. Calhoun, supra, when the Court stated:

> "In our opinion the statutory definition of 'employment' as provided in section 42 (1) of the act is clear and unambiguous. It means service performed for remuneration or under an oral or written contract for hire."

This would mean that anyone who works for another for pay is an employee under the act except those parties who are excepted by the statute.

Therefore, this Court finds from a review of the record, as well as the law applicable to this cause, that the decision of the appeal board and the Commission was a cor-

rect determination in holding that the services in question were performed for the plaintiff under a employer-employee relationship and that the owner-operators were not independent contractors.

A judgment may be entered in accordance with this opinion. No costs will be allowed.

/s/ LOUIS E. COASH
Circuit Judge

Dated: December 18, 1952.

Second Opinion of the Circuit Court

This matter came before the Court on an appeal from the Appeal Board of the Michigan Unemployment Securities Commission. After the hearing and argument of counsel, the Court filed an Opinion upholding the decision of the Commission. The plaintiff immediately filed a motion for a re-hearing alleging five grounds therefor, one of which was that the Opinion of this Court upholding the Commission was "not in accordance with Federal law as same is applicable to the operations of the plaintiff". In the argument on the motion for the rehearing, plaintiff's counsel contended that the Court did not consider the exception provided in section 42 (6) of the Michigan Act as follows:

> "• • • the term 'employment' shall not include • • • (m) any service not included as 'employment' under the Federal Unemployment Tax Act • • •".

A rehearing was granted and excellent briefs were filed by counsel for each of the parties.

This Court is impressed that in its previous Opinion it did not give consideration to section 42 of the Michigan Act and that it was in error in overlooking exceptions therein provided. Giving due consideration to Section 42, the Court must consider the question of whether the person or persons in question in the case at bar were independent contractors or were employees of the plaintiff under the Federal Act. Applying the test in the case of Carter Harrison, individually, and as Collector of Internal Revenue, vs. Grayvan Lines, Inc., 331 U. S. 704, the Court is of the opinion that the services performed for plaintiff would not be classified as employment under the Federal Act, and that the haulers were independent contractors. It follows that the plaintiff is not subject to the Michigan Act.

Judgment will enter reversing the Appeal Board and the Commission. No costs will be allowed.

/s/ LOUIS E. COASH
Circuit Judge

Dated: April 20th, 1954.

Majority Opinion of Michigan Supreme Court

STATE OF MICHIGAN—SUPREME COURT

Arthur Pazan, d/b/a Pazan Motor Freight, Plaintiff and Appellee, v. Michigan Unemployment Compensation Commission, Defendant and Appellant, and Appeal Board of the Michigan Unemployment Compensation Commission, Defendant and Appellee.	Calendar No. 46,385 Docket No. 13, June Term, 1955

(Filed December 1, 1955)

Before the Entire Bench.
Dethmers, J.

Presented is the question of plaintiff's liability as an employer for the year 1949 under the Michigan unemployment compensation act (CL 1948, §421.1 et seq. [Stat. Ann. §17.501 et seq.]). The answer turns on whether certain owner-operators of trucks were plaintiff's employees or independent contractors.

Plaintiff was in the trucking business, hauling goods for hire under Michigan public service commission certificates. He owned trucks which were operated by his employees. In addition, he leased from the owners trucks which were operated by them in furtherance of his business. The typical written lease provided that plaintiff should have complete control of the leased truck and assume all legal liabilities arising from its operation the same as though

it were owned by him and that, if operated by the owner, the latter should be deemed to be plaintiff's employee. The lease was cancelable by either party on 15 days' notice. Under the arrangement the owner could, at his option, drive the truck himself or furnish a driver; and plaintiff paid the owner for every load hauled 75% of the gross tariff received for the haul. The lease was silent with respect to the other material details of the arrangement, but the understanding and practice followed was that plaintiff told the owners where to pick up freight and where to deliver it, but did not dictate routes to be followed, and the owners kept the trucks serviced, repaired and supplied with gasoline, oil, tires and everything necessary to their operation at their own expense and at places or service stations of their own choosing. Plaintiff paid the 75% of the total tariff for a haul to the owner, sometimes by one check and sometimes by two, the smaller of the two usually amounting to 20% or 25% of the total paid the owner and being reported as wages for social security purposes and social security and income tax deductions being made therefrom. Plaintiff carried workmen's compensation insurance covering the owners and had a contract with a union under which they had certain privileges, including seniority rights as drivers over some employees driving plaintiff's own equipment. Occasionally the owners leased their trucks to and hauled loads for others than plaintiff, and sometimes they refused to make hauls for plaintiff which they did not consider sufficiently lucrative. The owners performed no service for plaintiff other than driving their own trucks. The trucks bore signs indicating that they were operating in plaintiff's business.

This case has come the route through determinations by the commission, referee and appeal board and is here on appeal from a circuit court judgment based on its hold-

ing that the owners were not plaintiff's employees under the act.

In defining "employment", section 42 (1) of the Michigan act in effect in 1949 read in part:

> "• • • service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied."

Section 42 (6) read in part:

> "Except as otherwise provided • • • the term 'employment' shall not include:
>
> "• • •
>
> "(n) Any service not included as 'employment' under the federal unemployment tax act (secs. 1600-1611 of the internal revenue code), as amended."

In Bonifas-Gorman Lumber Co. v. Unemployment Compensation Commission, 313 Mich. 363, the service involved, namely logging, was specifically exempt under the Michigan act unless included as employment under Title 9 of the federal social security act. With respect to that service, this Court said in Bonifas that:

> "Clearly, it was the intention of the legislature to exclude from the benefits of the statute persons rendering services of the character referred to (logging) unless such persons are entitled to be classed as employees under the social security act."

The distinction between the situation in which the service is one expressly exempted under the State act unless included as employment under the Federal act, as in Bonifas, and a situation in which the service is one, so defendants claim here, that is included under the State act unless expressly exempted by the federal act, scarcely seems con-

trolling. Section 42 (6) (n) speaks not merely in terms of exempting services which are expressly exempted under the federal act, but of excluding services which are not included as employment under the federal act.

Is the service in question included as employment under the federal act in effect in 1939 when section 42 (6) (n) of the Michigan act was enacted? We think that question is answered in United States v. Silk, 331 U. S. 704, and Harrison v. Greyvan Lines, Inc., 331 U. S. 704. For similarity of facts with respect to the truck owner-operators in the instant case, and in the Silk and Greyvan cases, see opinion therein. The Court there held the owner-operators to be independent contractors, not in employment under the federal act.

Defendants point to factual differences between those cases and this and seek to distinguish on that ground. While it may be said that there are indicia of the employer-employee relationship in the case at bar not present in Silk and Greyvan, the converse is equally true. We do not think the factual differences controlling of the legal conclusion to be drawn. Decision in Silk and Greyvan appears to have turned on considerations expressed by the court therein as follows:

> "* * * 'employees' included workers who were such as a matter of economic reality. * * * The taxpayer must be an 'employer' and the man who receives wages an 'employee.'
>
> "* * * Contracts, however 'skillfully devised' Lucas v. Earl, 281 U. S. 111, 115, should not be permitted to shift tax liability as definitely fixed by the statutes. * * * the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed

independent operation are important for decision. No one is controlling nor is the list complete. • • • the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success. • • • where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

Application of the quoted language to the facts at bar impels us to the conclusion that the owner-operators were independent contractors whose service was not included as employment under the federal act.

Affirmed, with costs to plaintiff.

Leland W. Carr
Henry M. Butzel
Edward M. Sharpe
Emerson R. Boyles
Neil E. Reid
Harry F. Kelly
Concurred with Dethmers, J.

Minority Opinion of Michigan Supreme Court

Simth, J. For Reversal.

We have presented to us in this case one of the most notorious of the contemporary legal puzzles, namely, whether or not one rendering a service for another is an independent contractor or an employee. I would not dispose of it in this Court as would my brother. It should go back to the triers of the facts for further determination in the light of what is herein contained.

We are, for the reasons noted by my brother, remitted to the Federal law in effect in 1939. We need not grope for guidance by analogy. The United States Supreme Court examined our problem and ruled thereon in United States v. Silk, 331 U. S. 704, and Harrison v. Greyvan Lines, *Id.* It remains for us only to apply the rule of that decision to the case at bar.

As a background for the understanding of what the Supreme Court did in these cases, it is necessary to understand that for years the determination of whether one was an independent contractor or a mere employee turned on the matter of control. Such was the test. If the man purchasing the service "controlled" the one rendering it, the latter was an employee. This is not the occasion to review the deficiencies of the test. Suffice to say it was, and is, ambiguous, uncertain, and slippery because, in part, under modern industrial conditions the master no longer works elbow to elbow with the servant, actually controlling his movements. Nowadays the control is usually "constructive." Hence the question arises and persists: Is control so indirect and elusive as to be deemed only "constructive," still to be regarded as "control" in any real sense? The cases here divide and redivide. With respect

to the tort cases the control test had at least an element of plausibility. It involved the idea of direction, of command, and it was not unreasonable that one who commanded a tort should respond in damages therefor. So, in general, ran the thinking of the formulating courts.

But this case does not involve a tort. It involves the problem of unemployment. What does control have to do with unemployment? With this question unanswered, we will proceed to the *Silk* and *Harrison* cases.

Each of these cases involved owner-operators who had leased their trucks, and their services, to another. In that respect they parallel the case at bar. In each the question was whether the owner-operator so leased was an employee or an independent contractor. In answering this question the lower Federal courts (as did the appeal board and the referee in the case at bar) leaned heavily upon the control test, apparently regarding it as conclusive. This was found to be error on the facts presented to the Supreme Court, but, since facts inevitably differ, it is not the ultimate finding but the reasoning of the court in reaching its holding with which we are concerned.

The reasons for the passage of the act were clearly set forth by the court:

> "The Social Security Act of 1935 was the result of long consideration by the President and Congress of the evil of the burdens that rest upon large numbers of our people because of the insecurities of modern life, particularly old age and unemployment."

Equally clear, in the words of the court, are those to be protected by the statutory coverage:

> "The very specificity of the exemptions, however, and the generality of the employment definitions indi-

cates that the terms 'employment' and 'employee,' are to be construed to accomplish the purposes of the legislation. As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation. These considerations have heretofore guided our construction of the act."

The court then addressed itself to our precise problem, the differentiation between the employee and the independent contractor, speaking as follows:

"The problem of differentiating between employee and an independent contractor, or between an agent and an independent contractor, has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was 'some simple, uniform and easily applicable test.' The word 'employee,' we said, was not there used as a word of art, and its content in its context was a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.' We concluded that, since that end was the elimination of labor disputes and industrial strife, 'employees' included workers who were such as a mat-

ter of economic reality. The aim of the act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants.' This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, §220."

It is indisputable that in its consideration of "economic realities" as determinative of employees' status the court is placing emphasis upon the idea of the (relatively) distinct economic enterprise. This is not to imply that differentiations and distinctions can be made only between different industries. The court is careful to observe that parts of a process may in reality be lodged in the hands of independent contractors:

> "Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social security taxes."

But the point made is one of dependence or independence as a matter of economic reality. This is clear from Bartels v. Birmingham, Collector of Internal Revenue, 332 U. S. 126, 130, which contains a summary of the test applied in the *Silk* and *Harrison* cases, phrased in the words of Mr.

Justice Reed, who had written for the court in the latter cases:

> "In *United States v. Silk, supra,* we held that the relationship of employer-employee, which determines the liability for employment taxes under the Social Security Act, was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or workers. Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In *Silk,* we pointed out that permanency of the relation, the skill required, the investment in the facilities for work, and opportunities for profit or loss from the activities were also factors that should enter into judicial determination as to the coverage of the Social Security Act. It is the total situation that controls. These standards are as important in the entertainment field as we have just said in *Silk* that they were in that of distribution and transportation."

In substance, then, the court held that one was an employee not because of control, or lack thereof, or because he did or did not employ his own means and methods in doing his work, but because of economic dependence, because he did his work "in the course of the employer's trade or business." The worker thus, in essence, followed "the usual path of an employee." (Rutherford Food Corporation v. McComb Wage and Hour Administrator, 331 U. S. 722, 729). Consequently his economic security was dependent upon the welfare of the owner's business and he was an "employee" for the purpose of this legislation.

The test derived, then, from the *Silk* and *Harrison* cases is clear: Employees are those who as a matter of economic reality are dependent upon the business to which they render service. But it will not be taken as laboring the obvious, we assume, if we observe that these cases should not be regarded as furnishing an automatic answer in this type of situation. We are looking at economic dependence, or independence. It is significant that in the *Silk* opinion the court notes that "they (those hired) may and did haul for others when they pleased." This has reference to those portions of the record in the United States Supreme Court, summarized in the words of the Tenth Circuit as follows:

> "Frequently they haul coal for other dealers, haul grain, foodstuff, furniture, wood, rock, or any other material for other merchants or for private citizens of the community. This is done without interference or control by appellee over them in any way." United States v. Silk, 155 F. 2d 356, 357.

The hauler thus described, hauling for whomever he wished as a matter of right, offers marked contrast to the hauler in the case at bar. The agreement before us provides that Pazan should have "complete control" of the equipment involved. In addition the owner-operators had to conform to prescribed hours "of employment," they were not advertised or listed in "phone or directories as being in such business and available to the public generally," and, with respect to driving for others and the penalties suffered therefor, if any, the testimony was confused and conflicting, ranging from "We try to get rid of them," to "We are very lenient and let them stay." There is much to support the conclusion that they are in fact, as they described themselves in their agreement, "employer" and "employee."

Error of law has thus come into the case, the wrong test of relationship having been applied. But it is not an error which we in this court can correct because the facts necessary for an application of the proper test are not yet in the record. We have before us only the facts developed for the application of the discredited control test. As to what additional facts may be adduced to apply the test of economic dependence we have no way of knowing, since it will depend upon the degree of economic linkage existing between Pazan and the owner-operator. On that point we cannot assume that the record is now complete. It is utterly silent, for instance, as to the percentage of total income of the owner-operators which came from Pazan and the percentage from other sources, a factor which, while not controlling, would normally have a substantial degree of persuasion in determining whether the owner-operator is Pazan's employee or an independent businessman. The assertion of economic independence by one who is obligated to another's payroll for his every loaf of bread, every pair of shoes, and every payment on his car would ill comport with reality.

We undertake only a limited judicial review. Mooney v. Unemployment Compensation Commission, 336 Mich. 344. There is ample statutory latitude below for the correction of error. Under the circumstances of this case, once we have indicated the basic criterion, it is the task of the agency to apply the proper legal standard to the necessary objective findings, a task confided to it by the legislature in the light of its expert competence in its specialized field.

In short, while I might feel on the record before us that the fortunes of the owner-operator are so inextricably linked to those of Arthur Pazan, d/b/a Pazan Motor

Freight, that he is within the category of those designed to be protected in event of economic disaster to Pazan, nevertheless I cannot predict that a full development of all pertinent facts required for the application of the proper test might not lead to the opposite conclusion.

Judgment of the circuit court is reversed and the cause remanded to the circuit court with instruction to remand the matter to the employment security commission for further proceedings not inconsistent herewith. No costs, a public question.

APPENDIX C—JUDGMENT

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capital, in the City of Lansing, on the first day of December in the year of our Lord one thousand nine hundred and fifty-five.

Present the Honorable Leland W. Carr, Chief Justice, Henry M. Butzel, Talbot Smith, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, John R. Dethmers, Harry F. Kelly, Associate Justices.

Arthur Pazan, doing business as Pazan Motor Freight, Plaintiff, v. Michigan Unemployment Compensation Commission, (Appellant), et al., Defendants.	46,385

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Ingham, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is No Error, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Ingham be and the same is hereby in all things affirmed, and that the plaintiff do recover of the appellant his costs, to be taxed, and that he have execution therefor.